82-995

No. ____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

KENNETH G. SMITH,

Petitioner,

—against—

JOHN LEHMAN, Secretary of the Navy, Washington, D.C. and the United States Department of the Navy,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR SECOND CIRCUIT

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QUESTION PRESENTED

Whether a probationary Federal employee, who is discharged for allegedly supplying false information on an employment form, has a liberty right in his good name and future employment possibilities meriting the holding of a hearing wherein the employee may show that the information was either not false in fact, or that he labored under a bona-fide misapprehension when he answered falsely.

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OPINIONS BELOW

The opinion and judgment of the United States Court of Appeals for the Second Circuit is reported at 689 F.2nd 342 (1982) and is printed in Appendix A hereto, *infra*, page 1. The prior judgment of the United States District Court for the Eastern District of New York is printed in Appendix A hereto, page 8.

JURISDICTION

The Judgment of the United States Court of Appeals for the Second Circuit (Appendix A *infra*, page 1) was decided on September 15, 1982. The jurisdiction of the Supreme Court is invoked pursuant to 28 USC Sec. 1254(1).

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

This case involves the Fifth Amendment to the Constitution of the United States, which provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

Petitioner brought this action following a wrongful dismissal from the Naval Investigative Service, seeking reinstatement and money damages, including back pay. Petitioner was hired as a Special Agent on October 6, 1980. He was dismissed on December 12, 1980, while still in a probationary status. Respondents moved for Summary Judgment and petitioner opposed this motion. Judgment was entered by respondents on March 1, 1982, pursuant to an Opinion and Order by Judge McLaughlin granting the respondents Summary Judgment. Petitioner filed an appeal contending that in so deciding, Judge McLaughlin erred.

The United States Court of Appeals for the Second Circuit affirmed the judgment of the district court.

BACKGROUND

Petitoner, who was working for the New York State Deputy Attorney General's Office as a Special Investigator, applied for a position with NIS as a Special Agent. He was hired by NIS (Naval Investigative Service) on October 6, 1980, after an interview and background investigation. As part of security clearance procedures, on October 10, 1980, petitioner completed "DD Form 398", which encompasses the employee's personal history. In November 1980, petitioner was asked to sign a waiver releasing all records to the Defense Investigative Service ("DIS"). He refused on advice of counsel.

The DIS investigation revealed what appeared to be a misleading or erroneous statement on two distinct parts of DD Form 398.* Petitioner was told by his supervisor that NIS

* In response to item 18, which inquires into prior arrests, plaintiff wrote: "08-01-80 Disorderly Conduct, Albany Police Court, Albany, New York, Judge KEEGAN presided. Case dismissed."

In response to item 13, concerning why he left his job with the New York State Deputy Attorney General's Office, petitioner wrote: "Not a permanent agency." The Deputy Attorney General's Office, however, had asked him to resign the day it learned of his arrest.

undertake an independent investigation and that petitioner would be requested to furnish a sworn statement. On December 9, 1980 the Regional Director of Operations attempted to question the petitioner and petitioner refused to make any statements at that time upon advice of counsel.

Petitioner was fired on December 12, 1980. The letter from the Acting Director of NIS notifying petitioner of his dismissal states that he was removed for "falsification of an official record." On the effective date of termination, petitioner expressed a desire to hold a meeting between the parties and their attorneys. The request was denied. In January, 1981, petitioner wrote Edward J. Hidalgo, who was then Secretary of the Navy, requesting that he be reinstated. The request was denied. The district court found that petitioner had not been employed since his discharge from the Navy.

Petitioner alleges that the information supplied on DD Form 398 was "honest and true" and claims that respondent's actions were arbitrary and capricious, were not in accord with applicable law and regulations, and deprived him of his Fifth Amendment right to a hearing. The statute pursuant to which petitioner was dismissed requires an *intent* to falsify, an essential element that is absent in petitioner's case. 18 U.S.C. Sec. 1001.

Petitioner had honestly and sincerely believed his statement to be an accurate statement of the outcome of his arrest. Actually, a charge of official misconduct had been dismissed and a charge of criminal impersonation had been reduced to disorderly conduct, to which petitioner pled guilty. The file was to be sealed. Prior to his dismissal, petitioner was never accorded a hearing or an opportunity to call witnesses to substantiate his claim that his mis-statement was the result of an honest misunderstanding of the Court procedures in which he was involved.

Petitioner claimed below that his dismissal in the absence of substantial evidence to support the charge, and the respond-

ents' denial of a hearing, was arbitrary and capricious, an abuse of discretion without rational basis, and violative of his Constitutional rights.

Respondents moved for Summary Judgment and petitioner opposed this Motion. Judge McLaughlin issued an Opinion, (Appendix A) granting the respondents' motion for summary judgment.

THE RULINGS BELOW

The district court ruled that summary judgment must be granted to the respondents because neither a property interest nor a liberty interest was implicated in this case. The district court ruled that a probationary employee, like the petitioner, has no entitlement to continued employment. The court further held that petitioner was notified and dismissed in accord with procedural regulations and was entitled to no more protection. The district court further held that petitioner had no protected liberty interest since there was no claim that the stigmatizing information was made public. For these reasons, the court held that petitioner suffered no due process deprivation.

The Court of Appeals expressed agreement with the district court's holdings since petitioner failed to raise a triable issue of material fact concerning his claim that he was deprived unconstitutionally of liberty and property interests.

REASONS FOR GRANTING THE WRIT

I.

CERTIORARI SHOULD BE GRANTED SINCE AN IMPORTANT QUESTION OF FEDERAL LAW SHOULD BE SETTLED BY THIS COURT:

The courts below recognized that an opportunity to be heard is essential where "a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him." (*Board of Regents v. Roth,* 408 U.S. 564, 573, quoting *Wisconsin v. Constantineau,* 400 U.S. 433, 437 (1971). This right arises out of the due process need of the subject of government action to vindicate his rights to his name and reputation, which has been termed the "liberty interest." In *Bollow v. Federal Reserve Bank of San Francisco,* 650 F.2d 1093 (1981), the court noted that the boundary of liberty interests has been set at "accusations of moral turpitude such as dishonesty or immorality. . ." *Id.* at 1101. This is the very essence of the charge levied against petitioner.

The Court below, however, held that petitioner herein was not deprived of any due process protection because the *stigmatizing information was not false.* In so finding, the Court short-cut the purpose which underlies the liberty interest need for a hearing, namely the opportunity for the petitioner to develop the facts which demonstrate the falsehood of the charge.

In a letter to petitioner's attorney, dated February 19, 1981, W.E. Carroll, Deputy Assistant, Secretary of the Navy, predicated petitioner's dismissal on the following basis:

> A false statement on the DD 398 is a violation of the U.S. Code and is inconsistent with the high standards demanded of a Naval Investigative Service Special Agent.

Falsification of a government document is a violation of 18 U.S.C. Sec. 1001. It was this section that the Naval Investiga-

tive Service claimed that petitioner violated. In fact, the N.I.S. forwarded its file to the United States Attorney's Office in Philadelphia for its prosecutorial opinion, although no charges were ever filed. A necessary element of the offense is that the falsification be done "knowingly and willfully." The Courts have repeatedly interpreted the words "knowingly and willfully" to require a subjective awareness on the part of the actor that this acts are in violation of the statute, and a specific intent to violate the statute. This interpretation has been uniformly applied to the area of Federal employment. See *United States v. May,* 625 F.2d. 186, 190 and footnote 2, (8th Cir. 1980). Petitioner has maintained throughout these proceedings that he was innocent of any intentional falsification. Clearly, then, there is a genuine issue of fact as to whether the NIS charge is true. The most fundamental due process concepts dictate that when an employee in the Federal Service is dismissed for violation of a criminal statute, involving moral turpitude, or the knowing issuance of a false statement, he should be afforded a meaningful opportunity to refute such a charge. In petitioner's case, such circumstances could only be shown by the opportunity for petitioner to present mitigating circumstances in his defense.

Assuming arguendo, that Government has a legitimate need to ensure efficient, nondisrupted service to the public and therefore possesses certain powers to dismiss an employee who is lazy, inefficient, insubordinate, or incompetent; then, concomitantly, the individual has both a liberty interest as enumerated in *Board of Regents v. Roth,* 408 US 564 (liberty encompasses an employee's interest in his good name and integrity and in avoiding the stigma of discharge with concomitant diminution of further job prospects, *see* e.g. *Hopstrop v. Board of Junior College District No. 515,* 471 F.2d 488, loss of job deemed a "liberty" interest) and a property interest in keeping his or her employment, as enunciated in *Bell v. Burson,* 402 US 535, 539.

At the threshold level, to determine whether due process requirements attach, the *nature* of the interest at stake must be ascertained.

> ". . .The Court has also made clear that that property interests protected by procedural due process extend well beyond actual ownership of real estate chattles and money . . . the Court has required due process protections for deprivations of liberty beyond the sort of formal constraints imposed by the criminal process . . . For the words 'liberty' and 'property' in the Due Process Clause of the Fourteenth Amendment must be given some meaning. *Board of Regents v. Roth, supra.*

Although the Supreme Court of the United States has eschewed placing constraints and rigidly defining the words "liberty" and "property" within the context of the Due Process Clause, the Court has held:

> "Without doubt, it denotes not merely freedom from bodily restraint, but also the right of the individual to contract, *to engage in any of the common occupations of life.*" (emphasis added) . . . generally to enjoy those privileges long recognized . . . *as essential to the orderly pursuit of happiness by free men,* (emphasis added, *Meyer v. Nebraska,* 262 US 390, *In a Constitution for a free people, there can be no doubt that the meaning of 'liberty'* must be broad indeed, (emphasis added), *Board of Regents v. Roth, supra, Bolling v. Sharpe,* 347 U.S. 497; *Stanley v. Illinois,* 405 U.S. 645.

Dismissal from public employment for cause may implicate liberty interests in imposing upon the discharged employee a stigma of incompetence or wrongdoing that forcloses "his freedom to take advantage of other employment opportunities." *Arnett v. Kennedy,* 416 U.S. 134 (1974); *Roth, supra; see, Wisconsin v. Constantineau,* 400 U.S. 433 (1971).

Justice Marshall, in the case of *Arnett v. Kennedy,* affirmed by a severely divided court, spoke in dissent, strongly asserting the cardinal principle that due process requires a balancing of the Government's asserted interest against those of the discharged employer. Further, he stated that the interests of a

public employee in secure Government employment, "are as weighty as other interests which . . . require at least rudimentary protection of a evidentiary hearing as a precondition to termination," citing *Board of Regents v. Roth, supra* at 212-213, among a long litany of cases for the proposition that:

> "This Court has often had occasion to note that the denial of public employment is a serious blow to any citizen . . . Employment is one of the greatest, benefits that governments offer in modern day life."

Dismissal from public employment for cause may therefore, implicate liberty interests in imposing on the discharged employee a stigma of incompetence and/or wrongdoing that forecloses "his freedom to take advantage of other employment opportunities." *Roth, supra,* at 573; *see Wisconsin v. Constantineau,* 400 U.S. 433. Particularly, as in the case at bar, dismissal from the NIS carries ramifications far beyond those associated with a position of a less sensitive nature.

Clearly, dismissal from the Naval Investigative Service places a heavy burden upon the dismissed Special Agent which inevitably must foreclose his freedom to take advantage of other employment opportunities. Although it is likely that petitioner would encounter little difficulty if he now opted for a career as cab driver or milkman, that is not the test. In *Mervin v. Federal Trade Commission,* 591 F.2d 821, 828 (1978), the Court found that a due process violation would arise if "circumstances of this *dismissal were such as would* effectively foreclose his *opportunities to obtain future employment in his profession.*" *Board of Regents v. Roth,* 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). (emphasis added).

Petitioner's chosen profession is federal investigative work. A perusal of his employment history reveals that he has been grooming himself for this position in Navy intelligence for several years. Since graduation from college he has worked for the New York State Deputy Attorney General's Office doing investigative and intelligence work and he has also worked for

the Federal Bureau of Investigation as confidential clerk. His career prospects will be severely hampered due to his dismissal on a ground implying moral turpitude, especially where it stands unchallenged.

Applicants for positions with such elite government agencies as the NIS are subject to the strictest scrutiny. Although there was no publication at the time of petitioner's termination, it would be ludicrous to suggest that petitioner would be able to seek similar employment without disclosure of the stigmatizing information. This is necessarily so because of the top secret security clearance required for the position. Thus, actual publication should not be a prerequisite to the invoking of due process rights in this case, particularly because of the inevitability of publication if petitioner is to seek employment in his profession. Moreover, an operative of the NIS has a highly specialized and non-transferable training. An individual who is stigmatized as is the petitioner, and who seeks new employment outside his specialized field, has a few, if any, employment opportunities, and most certainly finds a barrier due to his past unfavorable and unsavory dismissal from a highly regarded intelligence agency of the United States.

Given the scope of the liberty interest herein, and the inevitable ramifications of its denial, the dismissed employee must be afforded the opportunity to ascertain and test the strength of the evidence of his alleged misconduct by confrontation and cross examination of all party witnesses and by the opportunity to present exculpatory or other witnesses in his own behalf. *See Arnett v. Kennedy*, 416 U.S. 134 (1974).

The inadequacy of the procedure afforded petitioner is demonstrated most clearly by the following facts. On December 12, 1980, the effective date of his termination, petitioner requested an opportunity to meet with his supervisors and his attorney. This request was denied. When Smith refused to answer questions without an attorney, in view of the graveness of the charge, he did not know, and could not know, that he was waiving forever his right to refute such charge. Yet, this is

the result of the holding of the Court below. Petitioner submits that this holding violates the fundamental principal of due process.

Such circumstances deserve special attention in view of the fact that *Codd v. Velger,* 429 U.S. 624 (1977) the case most heavily relied upon by the Court below, was decided by a 5 to 4 decision with a vigorous dissent. In *Codd,* a police officer challenged his dismissal from his nontenured position with the New York City Police Department. The Court held he was not entitled to a hearing, and thus no liberty rights were violated, because *respondent did not challenge the substantial accuracy* of the *"stigmatizing" information in his report.* The following quote from the dissenting opinion of Justice Stevens bears particular significance in the instant proceedings:

> Today's holding may have the unfortunate effect of encouraging public officials to deny hearings when they feel confident of the correctness of their decision. But, in Mr. Justice Frankfurter's oft-quoted words: 'That a conclusion satisfies one's private conscience does not attest its reliability. The validity and moral authority of a conclusion largely depend on the mode by which it was reached. Secrecy is not self-righteousness gives too slender an assurance of rightness. No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done.' *Anti-Fascist Committee v. McGrath,* 341 U.S. 123, 171-172 (concurring opinion).
>
> As the last sentence in this quotation demonstrates, if state action has consequences sufficiently grievous to constitute a deprivation of constitutionally protected liberty, it is essential that fair procedures be followed for reasons that have nothing to do with the merits of the individual case. Today's holding is only a minor impair-

> ment of this principle. But the principle is one that admits of no compromise.

Codd v. Velger, 429 U.S. at 636. (Stevens, J., dissenting).

Therefore, procedural due process requires some form of hearing in the nature of either a pre- or post-dismissal category to satisfy constitutionally guaranteed liberty interests. We believe that the Court of Appeals narrowly construed "liberty interests" and ignored the stigmatizing nature of the facts underlying petitioner's dismissal. For these reasons, we believe that the district court's order should have been reversed.

CONCLUSION

WHEREFORE, petitioner respectfully prays that a writ of certiorari be granted.

Respectfully submitted,

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United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 24—August Term, 1982

(Argued September 13, 1982
Decided September 15, 1982)

Docket No. 82-6074

KENNETH G. SMITH,

Plaintiff-Appellant,

—against—

JOHN LEHMAN, SECRETARY OF THE NAVY, WASHINGTON, D.C., and the UNITED STATES DEPARTMENT OF THE NAVY,

Defendants-Appellees.

Before:

KAUFMAN, NEWMAN and PIERCE,
Circuit Judges.

Appeal from a judgment entered on an order of the United States District Court for the Eastern District of

New York, Joseph M. McLaughlin, *Judge*, granting summary judgment to defendants and dismissing appellant's complaint which alleged unconstitutional discharge from a civilian Navy position.

Affirmed.

BARBARA SIMON, Mineola, N.Y. (David S. Heller, Glenna B. Rubin, Solerwitz, Solerwitz & Leeds, Mineola, N.Y., *of Counsel*), *for Plaintiff-Appellant.*

SHIRA RUSKAY, Assistant United States Attorney for the Eastern District of New York, Brooklyn, New York (Edward R. Korman, United States Attorney for the Eastern District of New York and Miles M. Tepper, Assistant United States Attorney for the Eastern District of New York, Brooklyn, New York, *of Counsel*), *for Defendants-Appellees.*

KAUFMAN, *Circuit Judge:*

Smith appeals from Judge McLaughlin's grant of summary judgment to defendants, John Lehman, Secretary of the Navy and The United States Department of the Navy, and from the dismissal of his complaint which alleged wrongful termination of federal employment. Because we agree that appellant has failed to raise a triable issue of material fact concerning his claim that he was

deprived unconstitutionally of liberty and property interests, we affirm the judgment of the district court.

Smith was hired by the Naval Investigative Service ("NIS") as a special agent on October 6, 1980. Applicable federal regulations[1] provided that the first year of his employment would be a probationary period. Pursuant to standard security clearance procedures, Smith was required to complete a written personal history statement (Form DD-398) which he submitted to the NIS on October 16, 1980. There were two inaccuracies in this statement.

In response to question #18 which inquires about prior arrests, Smith wrote the following: "08-01-80 Disorderly conduct, Albany Police Court, Albany, New York Judge KEEGAN presided. Case dismissed." Smith had, in fact, been arrested while wearing woman's attire on August 1, 1980 in Albany, New York. Although one charge against him was dropped, Smith was convicted on his plea of guilty to a charge of disorderly conduct pursuant to N.Y. Penal Law § 240.20 (McKinney 1980), fined $100 and given a suspended sentence of 15 days. Also, Smith answered question 13 concerning his employment history by stating that he had left his previous position with the New York State Deputy Attorney General's Office because it was "not a permanent agency." In truth, Smith was asked to resign when that office learned of his arrest.

Despite Smith's refusal, given upon advice of counsel, to comply with a November 1980 request by the Defense Investigative Service ("DIS") for a signed waiver releasing his records, the DIS discovered the discrepancies between Smith's statements in his personal history and the actual record. On December 9, 1980 the Regional Director of

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1 5 C.F.R. § 315.801 *et seq.*

Operations for the NIS attempted to interview Smith concerning those discrepancies. But Smith, again upon advice of counsel, refused to comment at that time.

Appellant was discharged on December 12, 1980. He was informed in writing by the Acting Director of the NIS that he was removed for "falsification of an official record." After seeking reinstatement, Smith was also notified by the Deputy Assistant Secretary of the Navy in a letter dated February 19, 1981 that his incorrect statements on Form DD-398 were a "violation of the U.S. Code"[2] and "inconsistent with the high standards demanded of a Naval Investigative Service Special Agent."

Smith filed suit in the United States District Court for the Eastern District of New York on April 3, 1981 alleging that the Navy had violated his constitutional rights and acted arbitrarily and capriciously in violation of the Administrative Procedure Act.[3] The district court initially found that 28 U.S.C. § 1331[4] gave it jurisdiction over both of these claims.[5] The court held further that only those aspects of Smith's claims which alleged constitutional violations were not barred by the doctrine of

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2 *See* 18 U.S.C. § 1001.

3 5 U.S.C. § 701 *et seq.*

4 28 U.S.C. § 1331 provides: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States."

5 The district court correctly found that the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*, itself could not serve as a basis for federal jurisdiction. *Califano* v. *Sanders*, 430 U.S. 99, 106 n.6 (1977). Judge McLaughlin also properly rejected Smith's attempts to base jurisdiction on the Declaratory Judgment Act, 28 U.S.C. § 2201 and the "Further Relief" statute, 28 U.S.C. § 2202. These statutes furnish additional remedies but do not confer jurisdiction. *See Warner-Jenkinson Co.* v. *Allied Chemical Corp.*, 567 F.2d 184, 186 (2d Cir. 1977). Smith's reliance for jurisdiction on the federal mandamus statute, 28 U.S.C. § 1361, is similarly inapposite.

sovereign immunity.[6] Judge McLaughlin then concluded that Smith had not been deprived of a constitutionally recognized liberty or property interest.

On appeal Smith argues that the district court erred in rejecting his claim that the Fifth Amendment gave him the right to a hearing before he was dismissed from his job. We agree with Judge McLaughlin that this constitutional claim is sufficiently non-frivolous to create a basis for federal court jurisdiction pursuant to 28 U.S.C. § 1331. *See Hagans* v. *Lavine*, 415 U.S. 528 (1974). We are also inclined to accept the district court's conclusion that Smith's constitutional claims are not barred by the doctrine of sovereign immunity, *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1948), even where the success of Smith's claims would require affirmative action on the part of the government.[7] This difficult sovereign immunity question need not be decided, however, because Smith's constitutional claims cannot succeed on the merits.

Smith contends that his Fifth Amendment rights were violated when he was dismissed without a hearing to determine the accuracy of his allegedly false statements or whether these statements were made in good faith. He argues that the Navy unconstitutionally deprived him of both liberty and property interests. Judge McLaughlin properly rejected these arguments.

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6 Although the district court found jurisdiction, pursuant to 28 U.S.C. § 1331, for Smith's claim based on the Administrative Procedure Act, it found that claim barred by the doctrine of sovereign immunity. Smith does not challenge this finding on appeal, and we therefore decline to review it.

7 Judge McLaughlin's view that sovereign immunity does not apply in cases of alleged constitutional violations even where the sovereign is called upon to take affirmative action was proper. *See Hampton* v. *Mow Sun Wong*, 426 U.S. 88, 93 n.5 (1975).

Smith had no property interest in continued employment. Appellant's actions in falsifying an official record clearly cast doubt on his fitness as a special investigative agent; moreover, he received written notice of the reasons for his separation. Applicable federal regulations provide that a probationary employee may be terminated upon notification "in writing as to why he is being separated and the effective date of the action," if at any time during the trial period his "conduct . . . fails to demonstrate his fitness . . . for continued employment." 5 C.F.R. § 315.804. Smith therefore had no statutorily based right either to continued employment or to contest the Navy's allegations at a hearing. The law is clear that the constitutionality of the regulatory scheme which denies probationary employees the right to a hearing is not subject to a successful challenge. *See Sampson* v. *Murray*, 415 U.S. 61 (1974); *Heaphy* v. *United States Treasury Department*, 354 F. Supp. 396, 399-401 (S.D.N.Y. 1973), *aff'd*, 489 F.2d 735 (2d Cir. 1974). Accordingly, Smith cannot demonstrate a sufficient property interest to trigger due process protections. *See Board of Regents* v. *Roth*, 408 U.S. 564 (1972).

The appellant also argues that he was deprived unconstitutionally of a liberty interest.[8] He asserts that the Navy's decision to terminate his employment on the grounds that he "falsified an official record" will become part of his permanent employment history and that this will adversely affect his future job prospects. Smith contends that he should have been afforded a hearing to determine the accuracy of his statements on Form DD-

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[8] We note that Smith's status as a probationary employee did not diminish his constitutionally recognized liberty interest in protecting his reputation against the publication of false information by the Government. *See Board of Regents* v. *Roth*, 408 U.S. 564, 573 (1972).

398. Yet Smith's chief contention that his false statements were made in good faith, while relevant to a criminal prosecution, *see* 18 U.S.C. § 1001, has no bearing on whether those statements provided grounds for his termination. And an accurate reference in his employment record to the fact of his incorrect statements concerning his conviction does not impair his liberty interest regardless of his alleged good faith in making the statements. Even if we interpret Smith's ambiguous argument to include a claim that the statements in his personal history were true, that claim would be insufficient to upset Judge McLaughlin's grant of summary judgment to the appellees. *See Securities and Exchange Commission* v. *Research Automation Corporation*, 585 F.2d 31 (2d Cir. 1978). While we recognize that summary judgment is inappropriate where a triable issue of material fact exists concerning the interpretation and possible ambiguity of private agreements entered into between parties, *Heyman* v. *Commerce and Industry Insurance Co.*, 524 F.2d 1317 (2d Cir. 1975), the falsehood of appellant's statements in this case is uncontrovertibly established by the public record of his conviction. Smith cannot, therefore, challenge the "substantial accuracy" of the Navy's charges against him as he is required to do to demonstrate damage to his reputation. *Codd* v. *Velger*, 429 U.S. 624, 628-29 (1977). Accordingly, appellant's claim that he was deprived unconstitutionally of a liberty interest is without merit.

The judgment of the district court is affirmed.

Judgment

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CV-81-1023

KENNETH G. SMITH,

Plaintiff,

—against—

JOHN LEHMAN, Secretary of the Navy, and THE UNITED STATES DEPARTMENT OF THE NAVY.

Defendants.

A memorandum and order of Honorable Joseph M. McLaughlin, United States District Judge, having been filed on February 26, 1982, granting the defendants' motion for summary judgment, it is

ORDERED and ADJUDGED that the plaintiff take nothing of the defendants, and that summary judgment is hereby entered in favor of the defendants.

RICHARD H. WEARE
Clerk of Court

By: RICHARD C. HEINEMANN
Richard C. Heinemann
Chief Deputy Clerk

Dated: Brooklyn, New York
February 26, 1982

Memorandum and Order

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

81 Civ. 1023

(McL)

KENNETH G. SMITH,

Plaintiff,

—against—

JOHN LEHMAN, Secretary of the Navy, and THE UNITED STATES DEPARTMENT OF THE NAVY,

Defendant.

Appearances

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For Defendants

McLaughlin, District Judge

Plaintiff brought this action against a federal official and a federal agency alleging wrongful dismissal from a civilian position as a Special Agent with the Naval Investigative Service ("NIS").[1] He seeks reinstatement, money damages, and back pay.

1 The position was characterized as a "critical sensitive position . . . with access to Top Secret material and information."

I. BACKGROUND

Plaintiff, who was working for the New York State Deputy Attorney General's Office as a Special Investigator, applied for a position with NIS as a Special Agent. He was hired by NIS on October 6, 1980, after a successful interview and background investigation. As part of security clearance procedures, on October 10, 1980, plaintiff completed "DD Form 398", which is a detailed statement of personal history. In November 1980, plaintiff was asked to sign a waiver releasing all records to the Defense Investigative Service ("DIS"). He refused on advice of counsel.

The DIS investigation revealed what appear to be misleading or false statements on two distinct parts of DD Form 398.[2] Plaintiff was told by his supervisor that NIS would undertake an independent investigation and that plaintiff would be requested to furnish a sworn statement. On December 9, 1980, the Regional Director of Operations attempted to interview the plaintiff. Before the Director was able to read plaintiff his rights, however, plaintiff interjected that, upon advice of counsel, he would make no statements at that time.

Plaintiff was fired on December 12, 1980. The letter from the Acting Director of NIS notifying plaintiff of his dismissal states that he was removed for "falsification of an official record."[3] On the effective date of termination, plaintiff al-

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2 In response to item 18, which inquires into prior arrests, plaintiff wrote "08-01-80 Disorderly Conduct, Albany Police Court, Albany, New York Judge KEEGAN presided. Case dismissed." In fact, plaintiff had been arrested on a charge of criminal impersonation, had pled guilty to the reduced charge of disorderly conduct, was fined, and given a suspended sentence.

In response to item 13, concerning why he left his job with the New York State Deputy Attorney General's Office, plaintiff wrote: "Not a permanent agency." The Deputy Attorney General's Office, however, had asked him to resign the day it learned of his arrest.

3 *See* 18 U.S.C. § 1001. NIS forwarded its file to the United States Attorney's Office in Philadelphia for its prosecutorial opinion. No charges were filed.

legedly expressed a desire to hold a meeting between the parties and their attorneys. The request was denied. In January, 1981, plaintiff wrote Edward J. Hidalgo, who was then Secretary of the Navy, requesting that he be reinstated. The request was denied with the further finding that the plaintiff's false statement is "inconsistent with the high standards demanded" of NIS Special Agents. Plaintiff has not been employed since his discharge from the Navy.

Plaintiff alleges that the information supplied on DD Form 398 was "honest and true" and claims that defendants' actions were arbitrary and capricious, were not in accord with unspecified applicable law and regulations, and deprived him of his Fifth Amendment right to a hearing. He has not invoked any specific statutes or regulations in support of his claims. As the bases for this Court's jurisdiction, plaintiff alleges that the action arises under the Constitution and the laws of the United States and cites the federal question statute (28 U.S.C. § 1331), the mandamus statute (28 U.S.C. § 1361), the Declaratory Judgment Act (28 U.S.C. §2201), the "Further Relief" statute (28 U.S.C. § 2202), and Title 7 of the Administrative Procedure Act (5 U.S.C. § 701, *et seq.*). The matter in controversy is alleged to exceed the sum of $10,000, exclusive of interest and costs.

The defendants now move for a dismissal of the action, or in the alternative for summary judgment, on the ground that because there has been no waiver of sovereign immunity, this Court lacks subject matter jurisdiction. Plaintiff has failed to respond directly to the Government's sovereign immunity defense, arguing only that jurisdiction is established pursuant to 28 U.S.C. § 1331 because plaintiff is entitled to procedural due process under the Fifth Amendment.

II. JURISDICTION

Of the five jurisdictional bases alleged by plaintiff, only one, 28 U.S.C. §1331, vests this Court with jurisdiction. The Administrative Procedure Act, 5 U.S.C. §§ 701, *et seq.*, is not jurisdictional and "does not afford an implied grant of subject

matter jurisdiction permitting federal judicial review of agency action." *Califano v. Sanders*, 430 U.S. 99, 107 (1977). *See Estate of Watson v. Blumenthal*, 586 F.2d 925, 932 (2d Cir. 1978).

The Declaratory Judgment Act, 28 U.S.C. § 2201, the "Further Relief" statute, 28 U.S.C. §§ 2202, and the mandamus statute, 28 U.S.C. § 1361, do not confer jurisdiction but merely provide additional remedies where jurisdiction already exists. *See, e.g., Estate of Watson v. Blumenthal, supra*, 586 F.2d at 934-35; *Warner-Jenkinson Co. v. Allied Chemical Corp.*, 567 F.2d 184, 186 (2d Cir. 1977); *Lam Tat Sin v. Esperdy*, 227 F. Supp. 482 (S.D.N.Y. 1963), *aff'd*, 334 F.2d 999 (2d Cir.), *cert. denied*, 379 U.S. 901 (1964). However, because plaintiff has alleged that defendant's actions (1) were arbitrary and capricious, in violation of the Administrative Prodcedure Act, and (2) deprived him of his procedural due process rights under the Fifth Amendment of the Constitution, the Federal Question statute, 28 U.S.C. § 1331, does confer jurisdiction in this case. *Califano v. Sanders, 430 U.S. at 106-8; Doe v. United States Civil Service Comm'n*, 483 F. Supp. 539, 558 (S.D.N.Y. 1980). At the same time, because the remedies of reinstatement and damages requested by plaintiff would require expenditures from the public treasury, (*Land v. Dollar*, 330 U.S. 731, 738 (1947)), and would compel the Government to act, (*Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 704 (1948)), we are faced with the "Procrustean task" of reconciling myriad sovereign immunity decisions. *Malone v. Bowdoin*, 369 U.S. 643, 646 (1962).

III. SOVEREIGN IMMUNITY

It is elementary that the United States may not be sued without its consent. *United States v. Mitchell*, 445 U.S. 535, 538 (1980); *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 141 (1972). Consent usually takes the form of an "unequivocally expressed" waiver by Congress. *United States v. Mitchell, supra, quoting United States v. King*, 395 U.S. 1, 4 (1969). *See United States v. Kubrick*, 444 U.S. 111 (1979). Plaintiff, regrettably, has not cited any specific statute that

waives sovereign immunity. However, there are at least two waiver statutes that arguably might apply in this case: Section 702 of the APA and the Federal Question statute itself.

Section 702 provides:

> An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party.

Section 1331 provides:

> The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.

With respect to claims under the APA for equitable relief,[4] the Second Circuit, considered these sections but stated in no uncertain terms that, althouth there is federal question jurisdiction, the Government may nevertheless invoke the defense of sovereign immunity. *Estate of Watson v. Blumenthal, supra,* 586 F.2d at 932; *Doe v. Civiletti,* 635 F.2d 88, 94 (2nd Cir. 1980); *Doe v. United States Civil Service Comm'n,* 483 F. Supp. 539, 560 (S.D.N.Y. 1980). *But see Jaffe v. United States,* 592 F.2d 712, 718-19 (3d Cir. 1979); *Neal v. Secretary of the Navy,* 472 F. Supp. 763, 770-71 (E.D. Pa. 1979). The defendants in this case have invoked the sovereign immunity defense as to the plaintiff's claims under the Administrative Producedure Act. This Court, accordingly, must recognize the defense.

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4 Under the terms of section 702, claims for money damages under the APA are expressly barred by the doctrine of sovereign immunity.

Sovereign immunity, however, is not a defense to plaintiff's constitutional claims that the Navy violated his right to procedural due process. In *Larson v. Domestic & Foreign Commerce Corp., supra,* 337 U.S. at 689-91, the Supreme Court carved out an amorphous exception to the sovereign immunity doctrine, stating that it does not bar suits, like this one, against government officials where "power has been conferred in form but the grant is lacking in substance because of constitutional invalidity.[5] *Id. See Berk v. Laird,* 429 F.2d 420, 306 (2d Cir. 1970), *cert. denied sub nom. Orlando v. Laird,* 404 U.S. 869 (1971); *Cortright v. Resor,* 325 F. Supp. 797, 813 (E.D.N.Y.), *rev'd on other grounds,* 447 F.2d 245 (2d Cir. 1971), *cert. denied sub nom. Cortright v. Froehlke,* 405 U.S. 965 (1972). Thus, sovereign immunity is not a bar to suits against defendants charged with violating the Constitution; and this Court has jurisdiction under Section 1331 to review the constitutionality of defendants' conduct. *See Hampton v. Mow Sun Wong,* 426 U.S. at 93 n.5; *Doe v. United States Civil Service Comm'n,* 483 F. Supp. 539 (S.D.N.Y 1980).

IV. PROCEDURAL DUE PROCESS

Although this Court has jurisdiction to review plaintiff's procedural due process claims, summary judgment must be

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5 Not surprisingly, the *Larson* opinion has sparked considerable controversy. The Court in footnote 11 complicated the exception by stating that the "suit may fail" if the relief requested requires affirmative action by the sovereign, as is the case here. Although the Second Circuit suggested in 1971 that footnote 11 may describe the current state of the law, *Knight v. New York,* 443 F.2d 415, 421 (2d Cir. 1971), the Supreme Court has applied the exception without reference to the footnote. *See Malone v. Bowdoin,* 369 U.S. 643, 648 (1963); *Dugan v. Rank,* 372 U.S. 609, 620 (1962). Moreover, in 1975, the Court expressly approved and affirmed a district court ruling that soverign immunity was not a defense to an action challenging an allegedly unconstitutional civil service regulation. *Hampton v. Mow Sun Wong,* 426 U.S. 88, 93 n.5 (1975).

granted to the defendants because neither a property interest nor a liberty interest is implicated in this case.

A. *Property Interest*

It is axiomatic that an individual has no property interest in federal employment unless he has a specific entitlement to that position. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). Subject to narrow due process limitations, the federal government has the right to summarily discharge its employees. *See Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886 (1961). Indeed, "[d]ismissal from federal employment is largely a matter of executive agency discretion. Particularly is this true during the probationary period." *Toohey v. Nitze*, 429 F.2d 1332, 1334 (9th Cir. 1970).

Accordingly, a probationary employee, like the plaintiff, has no entitlement to continued employment. Procedurally, all a probationary employee is entitled to is a right to be notified prior to his termination "in writing as to why he is being separated and the effective date of the action." 5 C.F.R. § 315.804 (1981).[6] *See Perlongo v. United States*, 566 F.2d 1192 (Ct. Cl. 1977), *cert. denied*, 435 U.S. 944 (1978). The only right of appeal is to the Merit Systems Protection Board ("MSPB"); and this lies only in cases where the probationer

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6 There can be no dispute that this regulatory scheme is constitutional. *See Sampson v. Murray*, 415 U.S. 61, 80-81 (1979); *Jaeger v. Freeman*, 410 F.2d 528, 531 (5th Cir. 1969); *Jenkins v. United States Post Office*, 475 F.2d 1256, 1257 (9th Cir. 1973); *Heaphy v. United States Treasury Dept.*, 345 F. Supp. 396, 399-401 (S.D.N.Y. 1973); *Christian v. New York State Dept. of Labor*, 347 F. Supp. 1158, 1161 (S.D.N.Y. 1972) ("Certainly Congress intended that Federal employers should have an unfetterd right to terminate probationary employees. No termination hearing is prescribed or required nor should it be."); *Beefson v. Hudson*, 630 F.2d 622, 626 (8th Cir. 1980) (a probationary employee "can be dismissed at the virtually unreviewable discretion of his employee agency for unsatisfactory performance or conduct during the probationary period").

alleges discrimination or that his discharge was not in accord with proper procedure.[7] 5 C.F.R. § 315.806 (1981).

In this case, although he alleges that his answers were honest and true, the plaintiff made statements on his DD Form 398 (while he was a probationary employee) that are contradicted by publicly available documents and by facts uncovered in the DIS investigation. This conduct obviously does not accord with the high standards expected of NIS agents. Moreover, when provided with an opportunity to explain his answers, he refused, on advice of counsel.

I find, therefore, that plaintiff was notified and dismissed in accordance with the procedures required by § 315.804. He was entitled to no more.

B. *Liberty Interest*

The Fifth Amendment's due process clause protects a "liberty interest"; and this encompasses an "individual's freedom to work and earn a living." *Bollow v. Federal Reserve Bank of San Francisco,* 650 F.2d 1973, 1100-01 (9th Cir. 1981). However, an opportunity to be heard is essential only where "a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him." *Board of Regents v. Roth, supra,* 408 U.S. at 573 *quoting Wisconsin v. Constantineau,* 400 U.S. 433, 437 (1971). In such a case due process required "an opportunity to refute the charges," *Id.* at 2707, and the purpose is to "provide the person an opportunity to clear his name." *Id.* at 2707 n. 12. *See Wisconsin v. Constantineau, supra; Codd v. Velger,* 429 U.S. 624 (1977).

When a plaintiff's claim involves "stigmatization" resulting from termination, a Court will intervene only if the stigmatizing information is false, (*Codd v. Velger, supra,* 429 U.S. at

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7 Plaintiff has alleged neither ground in this case; and even if he had, his suit would be dismissed for failure to exhaust his administrative remedy of appeal to the MSPB.

627-28), or has been made public by the governmental agency involved. *Bishop v. Wood,* 426 U.S. 341, 348 (1970). *See Gentile v. Wallen,* 562 F.2d 193, 197 2d Cir. 1977).

There is no claim in this case that the stigmatizing information was made public. For that reason alone, plaintiff's action must be dismissed. Moreover, despite what plaintiff alleges, there can be no dispute that what he wrote on his DD Form 398, *i.e.,* that his case in Albany had been dismissed (when in fact he had been fined and given a suspended sentence) was false. "[I]f the hearing mandated by the Due Process Clause is to serve any useful purpose, there must be some factual dispute between an employer and a discharged employee which has some significant bearing on the employee's reputation." *Codd v. Velger,* 429 U.S. at 627. *Wehner v. Levi,* 562 F.2d 1276 (D.D.C. 1977).

In this case, the plaintiff cannot "challenge the substantial truth" of the NIS charge that he filed a false statement. Thus, a hearing in this case could only serve to let plaintiff try to explain away why he wrote the answers he did. Although plaintiff might demonstrate that it " 'might have been all a mistake . . .' [that] is not enough to raise an issue about the substantial accuracy of the report." *Codd v. Velger,* 429 U.S. at 628 (quoting plaintiff's excuse in that case).

Whether or not plaintiff receives a hearing, the fact of his arrest and its disposition will remain publicly available in the Clerk's Office in Albany, New York, and in direct contradiction to plaintiff's answer on DD Form 398. In addition, it bears emphasis that before he was terminated plaintiff was provided with an opportunity to explain his answers on the DD Form 398. On advice of counsel, however, he waived that opportunity. Plaintiff cannot now be heard to demand a hearing in this Court.

In sum, the Court finds that no property or liberty interests are involved in this case and that plaintiff has suffered no due process deprivation. *See Stewart v. Civil Service Comm'n of the City of New York*, N.Y.L.J., February 5, 1982, at 28, col. 1. For all the foregoing reasons, the defendants' motion for summary judgment is granted.

SO ORDERED.

Dated: Brooklyn, New York
February 19, 1982

JOSEPH M. McLAUGHLIN

Joseph M. McLaughlin, U.S.D.J.

The Clerk shall make copies of this Order and shall serve them upon the parties.